

No. 06-70884

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL ANGELO MORALES,

Petitioner-Appellant

v.

STEVEN ORNOSKI, Acting Warden
of California State Prison at
San Quentin,

Respondent-Appellee

DEATH PENALTY CASE

**EXECUTION IMMINENT:
February 21, 2006, at 12:01 a.m.**

**EXHIBITS IN SUPPORT OF APPLICATION TO FILE
SUCCESSOR PETITION AND PETITION FOR WRIT OF
HABEAS CORPUS**

VOLUME III (EXHIBITS 33-36)

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Exhibit 33

**Argument on California Penal Code section 1118.1 Motion
March 30, 1983**

1 VENTURA, CALIFORNIA; WEDNESDAY, MARCH 30, 1983; 8:48 A.M.

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5 (The following proceedings were held in open
6 court outside the presence and hearing of the jury.)

7
8 THE COURT: All right. We're in session outside the
9 presence of the jury to -- there's some defense motions.

10 Mr. Holmes, is it your intention to make a motion
11 or motions pursuant to 1118.1 of the Penal Code?

12 MR. HOLMES: That's -- that's correct, your Honor. My
13 motions would be --

14 THE COURT: Before you do that, I think we ought to have
15 the People rest on the record.

16 MR. GARBER: People rest.

17 THE COURT: Go ahead.

18 MR. HOLMES: That's right. I forgot.

19 My motions would be directed specifically to the --
20 the special circumstances alleged.

21 I feel that when considering the standard that we
22 apply in the 1118.1 in terms of whether it would be upheld on
23 appeal, I feel that there's been an insufficient showing by the
24 prosecution with regard to the special circumstance of lying in
25 wait and with regard to torture.

26 Of course, with regard to lying in wait, there's
27 the three elements of waiting, watching and concealment, and
28 I -- I don't think that there has been shown, at least in the

1 contemplation of the cases, at least the watching and the
2 concealment, and I'm not sure exactly what -- what waiting has
3 been shown other than a time -- some time period that precludes
4 any -- any homicide or any sort of assault between a victim and
5 the defendant.

6 As far as the watching is concerned, it's obvious,
7 I think, that there was no contact, at least from what the
8 prosecution has shown, between the defendant and the victim
9 prior to presumably him getting in the car and leaving with Mr.
10 Ortega, if that's what the evidence shows. All it shows is that
11 Ortega made some statements.

12 Nobody ever saw the victim in Ortega's car over at
13 the Morales residence. All we have are some statements of
14 intent, no indication that she in fact did go over to the
15 residence at that time and that -- and that she was there when
16 Mr. Morales left the residence with Mr. Ortega.

17 Either way, there's no preliminary sort of scouting
18 out or watching, which I think most of the cases talk about in
19 terms of people observing a place and then maybe either
20 subsequent to that, committing some sort of crime or coming back
21 at a later time and committing some crime.

22 If we are to assume that Mr. Morales was even --
23 was in the car in terms of the concealment aspect, it would be
24 hard to imagine how a person could be concealed in a car --
25 obviously, if a person were in a trunk, that would be
26 concealment from people in the passenger compartment.

27 But if we're to assume that all of the people were
28 in the car, I don't think we have -- we have any sort of

1 concealment.

2 I don't think in terms of all these elements we
3 have the coexistence -- or we don't have the proof of the
4 coexistence of all these elements at any -- at the same time,
5 which is what -- what the cases seem to require, that all three
6 of these coexist at the same time.

7 Furthermore, it appears that the statute requires
8 that the homicide or the killing occur while these three
9 elements are coexisting.

10 And while I feel there is insufficient evidence as
11 far as a couple of those elements existing or even coexisting at
12 the same time as the rest of them, there certainly is no
13 evidence to show that the killing occurred while these
14 particular elements existed.

15 And that's -- that's required, I think, by the
16 cases as opposed to what's required in terms of the special
17 circumstances is, I think, a little bit different than what's
18 required in terms of the felony murder doctrine.

19 In terms of felony murder, talks about the means by
20 which the homicide might take place. But the special
21 circumstances, I think, draws a distinction in terms of time.
22 And I don't feel that we have sufficient evidence with regard to
23 that particular factor.

24 As far as the torture is concerned, if we take the
25 position that there has to be an intent to commit torture, I
26 think the evidence taken from the prosecution's standpoint is
27 pretty obvious that there has not been shown any sort of intent
28 to commit torture.

1 From the statements the prosecution witnesses have
2 made, there appears to be probably an intent to kill; but an
3 intent to commit torture, I think, is totally lacking.

4 Most of the cases that talk about torture murder
5 either talk -- or speak of the defendant's statements about --
6 about desiring to inflict torture or other statements indicating
7 such intent.

8 I think in this case we have -- the only statements
9 we have is basically an intent to kill. We don't -- aside from
10 that, all we have is the condition of the body. And the cases,
11 I think, are pretty clear that you can't -- you can't consider
12 just the condition of the body as being sufficient to show an
13 intent to torture.

14 If we accept the prosecution's theory that a belt
15 was used and that a hammer was used and that then the knife was
16 used, it appears, I think, from the evidence that the attempt
17 all along was to -- to kill and not to torture and that the
18 means that were used were probably ineffective and that's why
19 the -- it appears that a number of different objects were used.

20 And when you consider the statements of, I think,
21 Dr. Lawrence, it appears that -- that it's hard to say which --
22 which of those could cause death.

23 With regard to the requirement in the special
24 circumstances of extreme in- -- infliction of extreme physical
25 pain, I think there's a problem there in terms of obviously the
26 question -- that, I think, implies that the victim -- that the
27 victim had to -- had to feel extreme pain.

28 If you accept Samuelson's version of what happened,

1 she was knocked out before any of these events happened. And if
2 somebody's unconscious, then it's a little difficult for them to
3 feel pain, let alone what extreme pain is, because everybody's
4 tolerance to pain is different.

5 So whether in fact she felt extreme pain is
6 virtually impossible to say, and I don't think the pathologist
7 could say what extreme pain is.

8 And that appears from the instruction to be one of
9 the requirements, not only that she -- she -- that she feel the
10 physical pain but that it must be extreme pain.

11 I think the last part of CALJIC 8.8118 is an
12 incorrect statement of the law when you take into account what
13 the -- what the prior -- what the prior death penalty law, the
14 1977 law stated and the changes that the 1978 death penalty law
15 stated in terms of whether there is any sort of awareness of
16 pain required by the victim.

17 I think in terms of torture murder, to establish a
18 first-degree murder, I think that's the law. But I think using
19 the standards of statutory construction, the changes made
20 between the '77 law and the '78 law show that that last
21 paragraph is not appropriate and that it's the infliction of
22 pain which contemplates the victim somehow being aware of the
23 pain and experiencing the pain that's required now.

24 And I don't think in view of the evidence that's
25 been presented that we can -- we can say with any certainty that
26 there was extreme pain experienced.

27 THE COURT: All right. Mr. Garber.

28 MR. GARBER: First of all, as to lying in wait, watching,

1 waiting and concealment, those are the -- ordinarily those are
2 the elements required. But there are two significant cases in
3 California that give an exception: People versus Ward, 27
4 Cal.App.3rd 218, and People versus Benjamin, 52 Cal.App.3rd 63.

5 And in both of those cases, they found that
6 concealment can be in a situation where the victim is taken
7 unawares, even though the victim sees the murderer.

8 The question is, is the purpose of the murderer
9 concealed, and that was the rule that both of those cases
10 pointed out.

11 I would invite the Court's attention to the brief
12 that I filed in this case on the points and authorities in
13 opposition to the motion to dismiss that was made earlier.

14 I'd ask the Court to review the brief beginning at
15 page --

16 THE COURT: Could you give me the filing date on it and
17 then I can find it.

18 MR. GARBEN: Yes. It was approximately June 11th, 1981.
19 And I went into, I believe, all the significant cases at that
20 time concerning lying in wait, and I got into a lot of quotes.

21 The lying in wait begins at page 21 on that brief.
22 I get into Ward and all of the cases. I don't know that I
23 actually got into Benjamin.

24 But I would ask the Court to review that material,
25 and the Court would see that there is an exception for a
26 situation where they are waiting and watching.

27 And in this case, the defendant is concealed
28 because he's behind the victim. He's in the back seat, and she

1 don't know what he's doing.

2 And the testimony of Bruce Samuelson --

3 MR. HOLMES: I don't think we have any testimony as to
4 what went on in the car.

5 MR. GARBER: Your Honor, I'd appreciate it if counsel
6 would allow me to finish. I waited very patiently for him.

7 But Bruce Samuelson at page 2336 of the transcript
8 testified that Morales told him that they took off in a car
9 northbound towards Lodi. And instead of going through on the
10 freeway, they went through town and waited until they got on the
11 outskirts where they were out of earshot or hearing distance
12 from anybody else.

13 And then he said that this was to avoid detection
14 from any outside source.

15 You put this in perspective with the statement of
16 Raquel Cardenas who said that the -- let me get the exact
17 quotes -- at page -- well, first of all, Page 2052, he said that
18 Morales was going to hurt the girl. He was going to strangle
19 her with his belt. He was going to put it around her neck.

20 And then in the area of 2059, when he started to
21 hit her, she was in the front seat passenger, he was behind her
22 and Rick was driving.

23 I think we have a situation -- actually, on either
24 of the grounds, either that she was unaware of his purpose and
25 also unaware of what he was doing because she didn't see him.

26 He was behind her waiting until they got to a
27 secluded area, out of earshot, the country area where there
28 weren't any people.

1 They drove from the city -- this would be a classic
2 case of kidnapping for robbery where you have to establish that
3 the distance driven places the victim in an additional
4 significant degree of danger. And I think it's analogous to the
5 lying in wait because here they drive from the crowded city of
6 160,000 population to the country area late at night, 20 miles
7 away, and this happens.

8 I think we have a lying in wait.

9 Now, counsel says you have to have the -- the
10 killing take place during the lying in wait. I assume he's
11 referring to People versus Domino. That is a case -- or Domino
12 versus Superior Court. That's at 129 Cal.App.3rd 1000.

13 And in that case, the Court ruled the evidence did
14 not support a lying in wait because the victim was captured
15 during the period of lying in wait but was not killed until one
16 to five hours later.

17 But in this case, the physical acts on the victim
18 start right immediately during that period. I don't think
19 there's any question that this was while lying in wait.

20 But I would invite the Court's attention to Domino
21 because it's one of those cases that goes right down the line of
22 all the lying-in-wait cases, the vast majority of the
23 lying-in-wait cases in California; and it spells them out, and
24 it really gives a good perspective on the law in lying in wait.

25 But I would submit that we have sufficient evidence
26 to get by an appeal on that issue. It's also my understanding
27 that the Court on a motion like this is required to look at the
28 evidence in the most favorable light towards the prosecution.

1 So let's get back to Bruce Samuelson on the torture
2 aspect.

3 He indicated that Morales told him that right at
4 the time of strangling the victim with the belt, she went
5 unconscious.

6 I don't think the evidence, though, really supports
7 that. First of all, we have Dr. Lawrence's testimony. The
8 severe injuries. But he also points out that she had defense
9 wounds. And those defense wounds, I think, indicate that she
10 was -- was fighting.

11 Dr. Lawrence at approximately 1782 said that there
12 were several defense-type wounds on the hands and forearms,
13 marks or bruises one would get if she were holding up her arms
14 to ward off blows. She had multiple bruises on her hands and
15 forearms.

16 And we have the testimony by Pat and Raquel -- one
17 of the two of them -- that the victim began screaming for Rick
18 to help her, and Raquel said he wanted to knock her out but she
19 wouldn't knock out.

20 And on cross-examination it was brought out he --
21 he thought he could hit her once or twice and she'd knock out,
22 but he had to hit her about 15 times before she knocked out.

23 Now, what about the intent that he had?

24 He told Raquel he wanted to hurt a girl. And in
25 this case when it went to the District Court of Appeal in People
26 versus Ortega -- or Ortega versus Superior Court, 135
27 Cal.App.3rd 244, that was a point the Court looked at. I think
28 they put a great deal of significance on that. His intent was

1 to hurt the girl. And obviously, we have coexisting intents, an
2 intent to kill and also an intent to hurt, to inflict extreme
3 pain.

4 Now, does the law require that the victim suffer
5 extreme pain? I don't believe it does. It's my understanding
6 that it's an intent to inflict extreme pain whether or not the
7 victim is unaware of -- whether or not the victim is aware of
8 it.

9 But I'd submit that the evidence shows this victim
10 was aware. The defense wounds, the statement by Raquel that he
11 had to hit her about 15 times before she'd knock out.

12 And then one other very significant fact: At the
13 autopsy, in one of her hands was a clump of what was apparently
14 her own hair.

15 Can you imagine what was going through her when she
16 in desperation is ripping out -- in one of her last acts,
17 ripping her own hair out, apparently trying to ward off the
18 blows? Now, if she wasn't suffering extreme pain, I don't know
19 anyone that would.

20 I would also invite the Court's attention to the
21 cases that were pointed out in my brief right along with the
22 lying-in-wait cases, but I would submit we have ample evidence
23 to get to a jury, to get beyond an appeal on both of the special
24 circumstances, lying in wait and torture.

25 THE COURT: All right. Give me just a few minutes here
26 to look at the points and authorities in opposition to the
27 motion to dismiss.

28 I found it now.

1 MR. GARBER: I would like to point out one thing, your
2 Honor. In my brief, I cited Engert for the proposition -- well,
3 anyway, I cited it for one proposition.

4 In the case of Ortega versus Superior Court, they
5 didn't like Engert, and they changed the law of Engert; in other
6 words, that there's no specific intent required for infliction
7 of pain. Apparently Engert did not indicate there was a
8 specific intent required.

9 But I would agree with Ortega versus Superior Court
10 that there is a requirement of specific intent to inflict pain.

11 MR. HOLMES: With regard to that intent, I would invite
12 the Court to People versus Robertson that discusses the
13 differences between CALJIC 824, the torture murder instruction,
14 and the one that's required under special circumstances and
15 indicates that the legislative intent was to eliminate that.

16 That was at -- I have the Cal.Rptr. cited, page 94.

17
18

1 THE COURT: In reading through the People's brief, I'm
2 eliminating and not reading or considering a substantial portion
3 of the brief that has to do with the co-defendant's statements
4 because they weren't received in this trial and, of course, are
5 not germane in this matter.

6 MR. HOLMES: Your Honor, I wonder while the Court is
7 reviewing that if I could have a few moments with my client.
8 That would give the Court an opportunity to -- to --

9 THE COURT: I am just about done.

10 MR. HOLMES: Oh.

11 THE COURT: There is an awful lot in this brief that
12 doesn't -- that doesn't pertain to the issues here and I am
13 skipping through that and I am --

14 MR. GARBER: Would the Court like any of those cases I
15 mention? I have about 10 of them here.

16 THE COURT: Not just yet.

17 Mr. Holmes, I am ready for your argument now, if
18 you wish any further response.

19 MR. HOLMES: No. I'd -- in terms of the -- I had
20 mentioned this People versus Robertson. Maybe the Court's read
21 it before. I have got a copy of it with regard to the
22 instruction on special circumstances for torture. Other than
23 that I would -- I would submit it.

24 THE COURT: If there is -- I can't remember the case by
25 name. If there is any particular portion of that that's
26 applicable maybe you could read it to me.

27 MR. HOLMES: I could just provide -- it's just on this
28 one page here.

1 THE COURT: All right.

2 MR. HOLMES: In fact, the one column, the first column.

3 THE COURT: This is 188 California Reporter at page 94.

4 All right. I have read it.

5 Mr. Holmes, are you submitting now?

6 MR. HOLMES: Yes.

7 THE COURT: Okay. The -- the Court feels that there is
8 sufficient elements -- there is sufficient evidence, the
9 elements of both special circumstances, both the lying in wait
10 and the torture special circumstance and denies the motion at
11 this time.

12 Would you like further time to consult with your
13 client before we bring the jury in?

14 MR. HOLMES: Yes, your Honor, I would.

15 THE COURT: Approximately how much time do you need?

16 MR. HOLMES: I would say 5 to 10 minutes.

17 THE COURT: Okay. Let's make it 9:30. The bailiff will
18 advise the jury that they will be brought in at 9:30.

19

20 (Recess taken.)

21

22 (The following proceedings were held in open court
23 in the presence of the jury:)

24

25 THE COURT: Good morning, ladies and gentlemen. I am
26 sorry to keep you waiting. There were some matters as I knew
27 there'd be this morning for the Court and counsel to attend to
28 outside of your presence. As a matter of fact, we started at

Exhibit 34

**Excerpt of Preliminary Hearing Transcript
(March 1981)**

1 done when Mr. Ortega was in view of his mother at his own
2 residence?

3 A. I'm sorry. Run that by me again.

4 Q. Was Mr. Ortega in view of his mother, at their
5 residence, when the suggestion from Mr. Ortega's mother
6 came up about having Rick see a psychiatrist?

7 A. Initially -- the first time it was said was at the
8 police station, and I don't think Rick was there. I think
9 Rick was still in Lieutenant Lund's office. And I think
10 the mother was outside the office. It was, I think, very
11 shortly after we had talked to him the second time. And
12 her indication at that point was, "what's going to happen
13 now? What can I do? When can I see him?"

14 THE COURT: Okay, gentlemen. I wish I had
15 taken this recess a little later.

16 Mr. Platt, you have a verdict in your case upstairs.
17 At this point we'll take a recess, let you go upstairs and
18 take the verdict because, otherwise, 12 jurors are going to
19 sit around.

20 You are directed not to discuss this case or your
21 testimony.

22 Come down as soon as you possibly can.

23 THE WITNESS: Certainly. It shouldn't take
24 that long.

25 (Whereupon at 2:59 p.m. a recess was taken
26 until 3:20 p.m., at which time the following proceedings
27 were had:)

28 THE COURT: All right. People versus Ortega

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1 and Morales. The defendants and counsel are present and
2 Mr. Garber is present.

3 Start again.

4 MR. WELLERSTEIN: Okay.

5 Q. I believe we were talking about contacting Dr.
6 Cavanaugh at the time when you got called out.

7 You indicated that there were basically two reasons
8 why you felt Dr. Cavanaugh or a psychiatrist should become
9 involved in speaking with Mr. Ortega. One was that it was
10 Mr. Ortega's mother's suggestion, is that correct?

11 A. That's correct.

12 Q. What exactly did she say to you that caused you to
13 come to that part of your conclusion?

14 A. She said that she was very concerned about her son,
15 that she did not want him just taken out there and left and
16 forgotten about, that he needs help, and asked that I do
17 what I could to get it.

18 Q. Okay. So you indicated to Mrs. Ortega that you would
19 endeavor to help Mr. Ortega while he was out at the jail?

20 A. That's correct.

21 Q. Did she give you any specifics as to why she was very
22 concerned about her son?

23 A. No. She talked to him and seen him -- saw him, and he
24 was still nervous, still upset. I believe they had a
25 little bit of time together where I know I stepped back and
26 off to the side and I think Sergeant Sanford did as well.
27 And I don't know what the conversation entailed. I believe
28 they sat on the couch right outside of Lieutenant Lund's

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1 office, inside the general detective area there, for a
2 couple of minutes, and I have no idea of the span of time.

3 Q. Was it just a suggestion that she made or was it
4 something more forceful than a mere suggestion?

5 A. It was a suggestion. It was something where she said
6 she was concerned and would I do what I could to get
7 somebody out there to help him, and I said yes.

8 Q. Had you talked with Mrs. Ortega prior to that
9 interview in the office? Had you personally talked to her?

10 A. No, I had not personally talked to her, I don't think,
11 before. The first time that I saw her -- because I had no
12 idea what she looked like and I know I didn't talk to her
13 over the phone. So that was the first time, to my
14 recollection, that I talked to her.

15 Q. Of those witnesses that you had interviewed prior to
16 speaking with Mr. Ortega, those other -- I believe you
17 named some names, Randy Blythe --

18 A. There was three, I believe, three besides Randy --
19 besides Rick that we talked to.

20 Q. Had you gotten any indication from any of those
21 witnesses that Mr. Ortega had been under psychiatric care?

22 A. I think Randy Blythe said something, but I don't
23 recall what it was.

24 Q. Had there been any indication from any of those
25 witnesses that you spoke with that Mr. Ortega had discussed
26 with any of those witnesses the idea of seeking psychiatric
27 care?

28 A. No, not that I can recall.

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1 Q. Okay. In contacting Dr. Cavanaugh, you indicated that
2 there were two reasons why you did it and one was his
3 mother's feelings and the other one was a high degree of
4 emotional feelings or emotions were running high, something
5 to that effect. How did you come to that conclusion?

6 A. Well, throughout the two statements that I took from
7 Rick Ortega he vacillated back and forth from very calm to
8 being very upset, crying several times uncontrollably, and
9 that, as well as the fact that it was obviously a major
10 crime, I wanted that base covered as well. So from my
11 point of view it was two-fold. It was because of what I
12 had observed, as well as a concern for covering that base
13 whether or not there was any outward signs.

14 Q. If you can answer the question, was the purpose behind
15 having Dr. Cavanaugh get involved in the case to aid Mr.
16 Morales in his personal problems or to aid the District
17 Attorney in the prosecution of the case?

18 A. Both. I felt that if Dr. Cavanaugh talked to him, he
19 would be able to make a determination as to whether there
20 was any psychiatric problems, as well as I had told his
21 mother and basically made a promise to his mother that I
22 would get somebody out there to talk to him, and I felt
23 obligated to do that. So it was both. I did have a
24 concern for the promise that I gave to his mother. I felt
25 that his mother and his family cooperated with us, I felt
26 that Rick Ortega had cooperated with us, was straightforward
27 with us, and I told them that I would get somebody there.

28 Q. You indicated you would do what you could for him?

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1 A. Yes.

2 Q. On how many occasions did you indicate that to Mrs.
3 Ortega, that you would do what you could for him?

4 A. Twice that weekend and then once I believe on the
5 Monday when he was brought to court. I think it was Monday.
6 Once at the police station, once at the house, when we went
7 to pick up the phone number. One of the last things she
8 said -- her and Rick had again some conversation at the
9 house, and as she left, she again expressed the same kind
10 of concern, the same kind of desire for somebody to talk to
11 him, somebody to help him, and I said I would get somebody
12 there.

13 And then I believe it was on Monday, the first day
14 they were brought into court, she had indicated there were
15 some problems at the house afterwards, that there was some
16 problems with Rick at the jail, and she asked me had I
17 talked to him or was anybody doing anything. And I said
18 yes, there had been and that I would check into it and make
19 sure that somebody talked to him to satisfaction her
20 concerns.

21 Q. Did she specify to you what the problems were at the
22 house or the problems at the jail that you just mentioned?

23 A. She didn't say what the problems were at the jail.

24 She mentioned the problems at the house were phone
25 calls. She said she had received several phone calls at
26 odd hours and that that was upsetting her and she had some
27 concerns about that.

28 Q. Threatening phone calls?

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1 A. We talked in the hallway there and I don't think we
2 ever got the chance to really go into it any more. I had
3 seen her just before the arraignment began, and I told her
4 that I would get her a chance, if I could, to see Rick
5 before they were taken back out to the jail. And I left at
6 that point to go see if I could arrange that with the
7 bailiffs. So I didn't talk to her any further about
8 anything, about the phone calls or anything else.

9 THE COURT: These phone calls weren't, to
10 your information, from Mr. Ortega, were they?

11 THE WITNESS: No. The indication was that
12 they were from people that were calling in a harassing type
13 manner. And she was upset about that.

14 THE COURT: Okay. You've answered my
15 question. Thank you.

16 MR. WELLERSTEIN: Q. Did she have any
17 feelings as to how the people who were calling got ahold of
18 her phone number?

19 A. I have never talked to her about that or she never
20 provided that information. That never came about, never
21 talked about it.

22 Q. Did Mr. Ortega talk to you about any kind of a signal
23 between Mr. Ortega and Mr. Morales?

24 A. On Sunday.

25 Q. Did he tell you what the function of that signal was?

26 A. That that was the point that Morales was going to put
27 the belt around Terri Winchell's neck and the signal for
28 him to just keep driving.

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1 Q. Did he tell you whose idea the signal was?

2 A. I believe he said it was Morales' idea. I don't
3 recall specifically.

4 Q. Did Mr. Ortega indicate to you that -- at any time
5 that he wasn't sure what was going to happen in the car?

6 A. Several times.

7 Q. Was this before he took you to the vineyard or after?

8 A. After.

9 Q. Did he talk to you in the car on the way to the
10 vineyard about that?

11 A. Excuse me. He mentioned on the way, as we were
12 driving, that he didn't know exactly what was going to
13 happen, that it was his understanding, his idea, that
14 Morales was going to choke her out and that they were going
15 to then push her from the car.

16 Q. "Choke her out" meaning rendering her unconscious? Is
17 that how he took it?

18 A. He said "choke her out." He said, "Once she's
19 unconscious, push her out."

20 Q. Did he indicate to you that Mr. Morales hadn't gone
21 into any of the specifics of what was going to happen?

22 A. He mentioned that a couple of times and he went back
23 and forth on what he meant by that. He explained. He
24 would say, "I didn't really know exactly what was going to
25 happen. As far as I knew, we would be driving along, Mike
26 was going to choke her out, we would push her out of the
27 car."

28 Q. When we asked him about the hammer, he indicated that

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1 he knew Mike had it and that Mike had said he was bringing
2 it along just in case.

3 Q. Okay. Did you understand that to mean to render her
4 unconscious?

5 A. Yes.

6 Q. Did Mr. Ortega indicate to you that the discussions
7 that he had had prior to the 9th with Mr. Morales involved
8 a choice between an act of vandalism on someone's home or
9 the rendering of Miss Winchell unconscious?

10 A. I think he talked about that on Sunday, the third of
11 the three statements I took from him. I think he indicated
12 that when he initially approached Morales with the problem
13 that he was having with Terri Winchell, that Morales
14 indicated, "well, we can either get her or we can get the
15 house."

16 Q. Whose house?

17 A. The statement was, "or we can get the house."

18 His question to that statement to Mr. Morales was, "what
19 do you mean?"

20 Morales then explained to him, "we can do her house,
21 we can do something to her house."

22 I believe they had that conversation, according to
23 Rick Ortega, two or three days before the incident on
24 Thursday.

25 Q. You mentioned a minute ago a problem with Miss
26 Winchell. What problem are we talking about?

27 A. In taking the three statements from Rick Ortega, the
28 problem was discussed differently. Initially, when we

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